

This is a claim for an October 5, 2001 accident and resulting back injury, which the parties stipulated arose out of and in the course of claimant's employment with respondent. In the July 14, 2004 Award, Judge Appling awarded claimant benefits for a 10 percent permanent partial general disability, which was based upon claimant's whole person functional impairment rating. The Judge also found claimant's average weekly wage to be \$367.60. Judge Appling awarded claimant \$10,170.82 in permanent partial general disability benefits.

Claimant contends Judge Appling erred. Claimant argues respondent laid him off while he was being accommodated for his back injury and, therefore, he is entitled to receive a work disability (permanent partial general disability greater than the whole person functional impairment rating). In his brief to the Board, claimant argues he has sustained a task loss somewhere between 13 percent and 40 percent and a wage loss of 31 percent. In that brief, claimant requests the Board to find a 31 percent work disability.

Likewise, respondent also contends Judge Appling erred. Respondent requested the Board to consider its June 10, 2004 submission letter to former Administrative Law Judge Jon L. Frobish as its brief to the Board. In that submission letter, respondent argues claimant failed to prove the percentage of task loss he suffered due to the October 2001 accident as he failed to tell his vocational expert, Karen Crist Terrill, about the mold maintenance job that he was performing on the date of accident. Consequently, respondent argues claimant has a zero percent task loss for the permanent partial general disability formula contained in K.S.A. 44-510e.

In its submission letter, respondent also argues claimant sustained a 47 percent wage loss and a 23.5 percent work disability during the approximate four-month period he was employed by the City of Neodesha after the accident. Respondent contends that in March or April 2002 claimant obtained employment with Prestige Cabinets, which reduced his wage loss to 28.6 percent and his work disability to 14.3 percent during the approximate 15 months claimant worked for that employer. Furthermore, respondent argues claimant next began working for a company named Charloma at which time claimant's wage loss was reduced to 18.5 percent and his work disability was reduced to 9.25 percent until January 2004, when Charloma began providing claimant fringe benefits. And finally, respondent argues claimant should not receive a work disability after January 2004 because the fringe benefits Charloma provided were allegedly comparable to the fringe benefits that respondent provided and, therefore, claimant's post-injury earnings were at least 90 percent of the wages that he was earning on the date of accident.

According to the calculations in respondent's submission letter, claimant should receive an award for 59.345 weeks of permanent partial general disability benefits totaling \$16,579.36.

The only issues before the Board on this appeal are:

1. What is claimant's average weekly wage for purposes of computing his permanent partial general disability benefits?
2. What is the extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. The parties stipulated claimant's October 5, 2001 accident and resulting low back injury arose out of and in the course of his employment with respondent, a boat manufacturer. Due to a shoulder injury, at the time of the accident claimant was performing a light duty job he called mold maintenance rather than his regular job of gel coating. According to claimant, at the time of the accident he had been scheduled to return to his gel coating job the next week.
2. Claimant earned \$9.19 per hour performing the mold maintenance job but he earned \$11.21 per hour performing the gel coating job. In addition, respondent paid claimant a production bonus and overtime pay, and provided claimant with both health insurance and life insurance.
3. Following the accident, claimant reported his injury to his supervisor and respondent referred claimant to a chiropractor. The chiropractor gave claimant some work restrictions under which claimant worked for approximately one week until he was laid off.<sup>1</sup>
4. Within two or three weeks of his layoff, claimant obtained a job with the City of Neodesha picking up trash, cleaning streets, and cleaning the recreational buildings for \$6 per hour. Claimant worked for the City of Neodesha for four or five months and then left to work for Prestige Cabinets where he drove a fork lift and earned \$7.25 per hour. Claimant testified he was employed to work 40 hours per week at both the City of Neodesha and Prestige Cabinets. Neither the City of Neodesha nor Prestige Cabinets paid claimant overtime. The City of Neodesha did not provide claimant with any fringe benefits but Prestige Cabinets provided claimant with some insurance benefits and some retirement benefits. But claimant did not know the employer's cost of those benefits.
5. After working for Prestige Cabinets for approximately a year and three months, claimant left that employer and began working for Charloma as a fork lift driver. At the time of the October 2003 regular hearing, Charloma was paying claimant \$9.25 per hour. Moreover, claimant testified he would be eligible for the company's health insurance benefits in three months.

---

<sup>1</sup> R.H. Trans. at 16-17.

6. Claimant's attorney hired vocational expert Karen Crist Terrill to develop a list of the work tasks that claimant performed in the 15-year period before his October 2001 accident. Ms. Terrill spoke with claimant in April 2002 and formulated a list of 15 different former work tasks. According to Ms. Terrill's June 27, 2002 report to claimant's attorney, claimant was working for an unnamed employer at the time of their interview earning \$6 per hour. Claimant, however, did not tell Ms. Terrill about the mold maintenance job he was performing on the date of accident and, therefore, Ms. Terrill's task list omits that job. At her deposition, which was conducted in April 2004, Ms. Terrill testified claimant retained the ability to earn \$6 per hour. But Ms. Terrill was not aware claimant had worked for Prestige Cabinets and Charloma earning more than that hourly rate.
7. Dr. James K. Cole, who saw claimant on two occasions, testified he first saw claimant in January 2003 and diagnosed chronic sacroiliitis or chronic muscle tear. After claimant underwent a period of physical therapy, the doctor saw claimant again in late February 2003 and diagnosed chronic muscle strain. At the latter visit, the doctor released claimant from care and to activities as tolerated. Dr. Cole, who is an orthopedic surgeon, rated claimant as having a five percent whole person functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (5th ed.). After reviewing the list of former work tasks identified by Ms. Terrill, (although the record is not entirely clear) the doctor indicated claimant should no longer perform two of the 15 tasks, or approximately 13 percent. The two tasks eliminated by the doctor required claimant to lift or carry objects weighing 80 pounds.
8. The only other medical expert to testify in this claim was Dr. Edward J. Prostic, whom claimant's attorney hired. Dr. Prostic, who is also an orthopedic surgeon, examined claimant in January 2002 and again in March 2003. The doctor diagnosed a sprain or strain superimposed upon a spondyloarthropathy (an arthritic condition) and rated claimant under the AMA Guides (4th ed.) as having a 10 percent whole person functional impairment due to the October 5, 2001 accident. The doctor also testified that claimant should observe the following work restrictions:

[Claimant] should not lift weights greater than 45 pounds occasionally or 15 pounds frequently, with all significant lifting in the optimum position for his low back.

He should also avoid frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, or captive positioning.<sup>2</sup>

---

<sup>2</sup> Prostic Depo. at 9-10.

After reviewing Ms. Terrill's list of former work tasks, Dr. Prostic determined claimant should no longer perform six of the 15 tasks, or 40 percent.

9. In its submission letter to the Judge, respondent represented that claimant's average weekly wage for purposes of this claim was \$454.24, which represented \$367.60 in straight time, \$18.63 in overtime, \$19.82 in production bonus, and \$48.19 in additional compensation items (fringe benefits).<sup>3</sup> At the October 27, 2003 regular hearing, claimant introduced his suggested calculations of his pre-injury average weekly wage. It appears that claimant's overtime is the only area of disagreement as claimant suggested that his overtime for the 26-week period before the October 5, 2001 accident averaged \$18.82 per week.<sup>4</sup>
10. At the regular hearing, claimant presented earnings records from respondent that indicated he averaged \$18.83 per week in overtime. Accordingly, the Board finds claimant's average weekly wage for computing his workers compensation benefits is \$454.44.

#### CONCLUSIONS OF LAW

Because claimant has sustained an injury that is not contained in the schedules of K.S.A. 44-510d, claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall**

---

<sup>3</sup> Respondent's Brief at 3 (filed June 17, 2004).

<sup>4</sup> R.H. Trans., Cl. Ex. 2.

**not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.**  
(Emphasis added.)

Following the October 5, 2001 accident, respondent accommodated claimant's work restrictions for approximately one week until the company laid him off. Respondent's submission letter acknowledges that claimant is entitled to a work disability under these facts. And the Board agrees.

As indicated above, the Board finds claimant's average weekly wage on the date of the accident for purposes of this claim is \$454.44. Following his layoff, claimant earned no wages for approximately two weeks and, therefore, has a 100 percent wage loss for those two weeks. During claimant's employment with the City of Neodesha, claimant earned \$240 per week (\$6 per hour x 40 hours per week) and, therefore, claimant had a 47 percent wage loss for approximately four months. Claimant's wage loss then decreases to 36 percent for the approximate 15-month period that he was employed by Prestige Cabinets as he earned approximately \$290 per week (\$7.25 per hour x 40 hours per week) working for that employer. Finally, claimant's wage loss for the permanent partial general disability formula decreases to 19 percent when he began working for Charloma earning \$370 per week (\$9.25 per hour x 40 hours per week). The record does not provide the specific starting and ending dates for these various periods and, therefore, the Board must approximate.

Furthermore, the Board is mindful that claimant received some fringe benefits from Prestige Cabinets and that he testified he would soon be eligible to receive some fringe benefits from Charloma. But respondent failed to prove the average weekly value of those additional compensation items and, therefore, they cannot be included in calculating claimant's post-injury wages.<sup>5</sup>

Respondent contends claimant has failed to prove his percentage of task loss as Ms. Terrill did not analyze claimant's mold maintenance job for her task list. The record indicates respondent noted the omission as early as December 2003 when the parties took Dr. Prostic's deposition.<sup>6</sup> Therefore, the parties were likewise aware of the omission when claimant took Ms. Terrill's deposition in April 2004. Despite that knowledge, claimant chose to go forward with submitting his case to the Judge rather than supplementing the deficient task list.

---

<sup>5</sup> See K.S.A. 44-511.

<sup>6</sup> Prostic Depo. at 17.

The Board concludes that claimant has failed to prove the percentage of task loss and, consequently, zero percent should be used in the task loss prong of the permanent partial general disability formula. At the time of the accident, claimant was performing the mold maintenance job. Ms. Terrill did not analyze that job to break it down into specific work tasks. Accordingly, the record does not establish the total number of work tasks that claimant performed in the 15-year period before his October 2001 accident. And as the total number of work tasks is the denominator in determining the percentage of loss of former work tasks, in this instance it is not possible to perform that calculation without engaging in pure speculation.

Dr. Prostin rated claimant's whole person functional impairment under the AMA *Guides* (4th ed.). But Dr. Cole used the AMA *Guides* (5th ed.). As K.S.A. 44-510e requires the AMA *Guides* (4th ed.) to be used, the Board finds claimant sustained a 10 percent whole person functional impairment due to his October 5, 2001 accident.

Averaging claimant's wage loss percentage with his zero percent task loss yields the following permanent partial general disability percentages for the following periods:

For the period from October 13, 2001, through October 26, 2001, claimant's wage loss was 100 percent and his permanent partial general disability is 50 percent.

For the period from October 27, 2001, through February 28, 2002, claimant's wage loss was 47 percent and his permanent partial general disability is 24 percent.

For the period from March 1, 2002, through May 31, 2003, claimant's wage loss was 36 percent and his permanent partial general disability is 18 percent.

For the period commencing June 1, 2003, claimant's wage loss was 19 percent and his permanent partial general disability is 10 percent.

Consequently, the July 14, 2004 Award should be modified.

### **AWARD**

**WHEREFORE**, the Board modifies the July 14, 2004 Award, as follows:

Justin W. Voorhies is granted compensation from Cobalt Boats and its insurance carrier for an October 5, 2001 accident and resulting disability. Based upon an average weekly wage of \$454.44, Mr. Voorhies is entitled to receive the following disability benefits:

For the period through October 12, 2001, Mr. Voorhies is entitled to receive one week of permanent partial general disability benefits at \$302.98 per week, or \$302.98, for a 10 percent whole person functional impairment.

For the period from October 13, 2001, through October 26, 2001, Mr. Voorhies is entitled to receive two weeks of permanent partial general disability benefits at \$302.98 per week, or \$605.96, for a 50 percent work disability.

For the period from October 27, 2001, through February 28, 2002, Mr. Voorhies is entitled to receive 17.86 weeks of permanent partial general disability benefits at \$302.98 per week, or \$5,411.22, for a 24 percent work disability.

For the period from March 1, 2002, through May 31, 2003, Mr. Voorhies is entitled to receive 53.84 weeks of permanent partial general disability benefits at \$302.98 per week, or \$16,312.44, for an 18 percent work disability.

For the period commencing June 1, 2003, Mr. Voorhies' permanent partial general disability decreases from 18 percent to 10 percent. But due to the accelerated payout formula in K.S.A. 44-510e, no additional permanent partial general disability benefits are payable.

The total award is \$22,632.60, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2004.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
John R. Emerson, Attorney for Respondent and its Insurance Carrier  
Marvin Appling, Special Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director